



## Memorandum

**To:** Mayor and City Council

**From:** Councilmember Pete Constant  
Councilmember Xavier Campos

**Subject:** SEE BELOW

**Date:** April 12, 2013

**Approved:**

**CP11-026. APPEAL OF THE PLANNING COMMISSION'S DECISION TO DENY A CONDITIONAL USE PERMIT REQUEST TO ALLOW THE DEVELOPMENT OF AN APPROXIMATELY 3,911-SQUARE FOOT PUBLIC EATING ESTABLISHMENT WITH A DRIVE-THROUGH USE ON AN APPROXIMATELY 13.1-GROSS ACRE PARCEL ON THE EAST SIDE OF MILLER AVENUE APPROXIMATELY 350 FEET SOUTHERLY OF BOLLINGER ROAD WITHIN THE ORCHARD FARM SHOPPING CENTER (6148 BOLLINGER ROAD).**

### RECOMMENDATION:

- 1) Approve the applicant's appeal for a Conditional Use Permit (CUP) to allow the development of an approximately 3,911 square foot public eating establishment with a drive-through use on an approximately 13.1-gross acre parcel at the subject location with the following conditions as mitigations to address concerns and achieve the intent of City Council Policy 6-10, Criteria for the Review of Drive-Through Uses:

#### Traffic/Parking Congestion:

- Provide one way exit only at front parking area to restrict left turns into site from Miller Avenue entry
- Ensure drive through window stacking lane is situated so that overflow from the stacking lane does not spill out onto public streets
- Ensure design is modified so that the drive-through stacking lane is separated physically from the parking lot
- Designate employee parking to the least utilized areas on site

#### Pedestrian Safety:

- Provide funding for crossing guard(s) at intersection of Bollinger Road and Miller Avenue during before and after school hours
- Enhance bus stop adjacent to site by installing shelter canopy, windscreen, lumbar rest or leaning rail, individual seating, and adding trash and recycling receptacle.
- Restrict pedestrian crossing points to drive-through lanes and incorporate pedestrian crossing points before and after stacking points outside of the drive-through lane
- Provide a center directory and way-finding signage
- Provide pedestrian signage and treatments at onsite crossings

- Install rumble strips to reduce speed of vehicle exiting drive-through lane
- Provide bike lockers and bike racks

Noise:

- Restrict Hours of Operation for the drive-through to 7:00 a.m. – 10:00 p.m.
- Restrict deliveries to no earlier than 7:00 a.m.
- Construct a 4-foot sound and headlight attenuation wall along the drive-through lane on the Miller Avenue side of development
- Place the location of order point in between the restaurant building and new bank building with a high level of landscaping in the area to reduce projection of sound towards residence

Design:

- Provide a “porte-cochere” cube to add articulation to building lines and a covered trellis to provide additional visual screening of drive-through lane consistent with other recent approvals in the City of San José
- Provide screening and roof for trash enclosure: Similar design and treatment as San Felipe McDonalds (4838 San Felipe Road)
- Provide outdoor patio dining adjacent to main frontage of the building and add an entrance to the restaurant building from the patio area
- Provide for direct pedestrian and bicycle access from Miller Avenue
- Ensure that the patio design provides an inviting outdoor dining experience consistent with the goals of the council to enhance and liven pedestrian areas

Hope Services:

- Identify a new location within the shopping center for the HOPE donation trailer
- Engage HOPE participants to perform litter patrols in the center and immediate surrounding neighborhood
- Engage HOPE on job placements for their clients as employees of the restaurant

2.) Close public testimony and continue this item for two weeks so that staff can prepare the appropriate Resolution and Permit language for final council approval.

**ANALYSIS:**

The City Council developed Council Policy 6-10, Criteria for the Review of Drive-Through Uses, to reduce impacts to neighborhood and residential areas. The policy was not put in place as a means to stop businesses from conducting their legal right to do business. Instead, the appeal process allows for the city council to review modifications to design and mitigations that will ensure the intent of the drive-through policy is achieved.

There has been significant public interest in this project. Because of this, District 1 hosted an additional community meeting to gather feedback from residents, businesses, and other stakeholders. The meeting was held at the Orchard Farm Shopping Center on March 28<sup>th</sup> and was attended by approximately 170 people. The input received is summarized in Attachment A.

Additional summary of the meeting is included in staff's supplemental memo dated April 10, 2013.

The attendees were allowed to speak with no time limit and each of their concerns were summarized and written down by a professional facilitator. The majority of the attendees opposed the project. However, the tone of the meeting was aggressive and stifled comments from those who support the project. This was apparent when a community member expressed support of the project and she was disrespected, yelled at, booed, and not allowed to continue her comments due the chanting the opponents initiated. The meeting got to a volatile point where we decided to end the meeting due to their disrespectful and disruptive behavior. However, we have received personal communications and e-mails from residents who have voiced their support for the project.

After reviewing the public comments received, including those from the March 28<sup>th</sup> community meeting, the three main concerns that are prominent are traffic concerns, pedestrian safety, and noise. My office discussed these concerns with the applicant and developers and worked with them to identify mitigating measures to address public concerns and to meet the intent of the council's drive through policy. The conditions noted above have been developed to address these concerns.

#### Concerns related to traffic

A traffic study was conducted stating that the drive-through will not interfere with vehicle circulation aisles or pedestrian paths of travel. There are also no conflicts with ingress or egress driveways and the signalized intersections or LOS policy. The project exceeds stacking requirement by 4 cars/80 feet and has primary ingress and egress from a four-lane major street. The drive-through stacking lane will be buffered by a four-lane roadway and landscaped median with over fifty feet of protected existing landscape. The drive-through window stacking lane is situated so that overflow from the stacking lane does not spill onto public streets. Parking congestion will be addressed by separating the drive-through lane physically from the parking lot and designating employee parking to the least utilized site.

#### Concerns related to pedestrian and bicycle safety

The applicant designed the drive-through restaurant so that the building, including its drive-through lanes, is situated inside the shopping center. The project will not encroach on the sidewalk or adjacent roads. The proposed mitigations outlined above ensures pedestrian and bicycle safety. The applicants also hired a consultant to conduct pedestrian safety study as a result of the concerns from the residents at the March 28<sup>th</sup> community meeting. The expert concluded that the location and design of this project will have no impact on employee or general public pedestrian safety, and that there no additional risk to pedestrians as a result of the project site circulation and design.

#### Noise concerns

The Mitigated Negative Declaration Findings by the City of San José states that the "project will not have a significant noise impact." The estimated noise levels from vehicles associated with the project do not significantly increase traffic noise along roadways in the project vicinity. The project will yield a noise level of 45-50 dBA, which is lower than the existing ambient sound created by the regular traffic along Miller Avenue, which is measured currently at 62 dBA. The recommended mitigations of

reducing the hours of operation, restricting deliveries to no earlier than 7:00 a.m., and construction of a 4-foot headlight and attenuation wall along the drive-through lane will ensure that the noise level remain below the current ambient noise. Other landscape and design elements along Miller Avenue will also provide additional buffer to the drive-through order point that will be placed between the restaurant and the new bank building.

Staff denied approval of the Conditional Use Permit citing that the project does not conform to the policy which states that a drive-through establishment cannot be located within 200 feet of residentially used parcels. The project proposal is currently at 165 feet, which is 35 feet less than the city's guidelines. It's important to note that although the nearest residential frontage consists of three parcels on Miller Avenue, the remaining residential homes sit more than 200 feet from the proposed restaurant. The mitigations outlined and described above will more than off-set the 35 foot deficiency.

Those opposing the project claim that the addition of McDonalds in the neighborhood will deteriorate the quality of life by promoting obesity and fast food. We are facing an Anti-McDonalds faction that is using this project to attack fast food. It is clear from communications received by my office, planning department, and at community meetings that the vast majority of this development's opponents are in opposition to McDonalds, not in opposition to a restaurant use.

The City Council cannot approve or deny CUPs based on the brand and the public perception that it may have. What we are evaluating here is approval for the usage of the land to have a restaurant and drive-through use. This site sits in a commercial shopping center and the intent for the CUP is for commercial use. We must focus on this project being a public eating establishment with a drive-through use and not the brand.

## **CONCLUSION**

The City Council should not send a message to property owners that the city can determine which tenant property owners can lease to if they meet the requirement and/or intent of our policy. To do so would be an inappropriate overreach of government action.

During the appeal process, the District 1 office worked diligently with the applicant and developer to identify mitigations in order to meet the intention of the policy. We believe that this project and the mitigations outlined above meet the goals and further enhance the neighborhood by placing design improvements such as adding landscape, porte-cochere, and covered trellis. In addition, this project will create a public plaza experience by adding an outdoor dining patio with an inviting atmosphere to pedestrians along Miller Avenue. All of these efforts along with the other improvements listed above would not have been on the table if this project met the 200 setback requirement and was approved through an administrative process without significant public input.

We believe that the combination of community comments and discussion with the applicants and developers resulted in an enhanced project that underwent significant improvements. In addition, this project will finally bring activity to a portion of a shopping center that has sat empty for the past twenty years and has been intended to have tenants on separate building pads. Other tenants in the shopping center welcome McDonalds as it will serve as an identifying landmark to their business resulting in an increase of business.

We have an opportunity to turn this area into a commercial space that will create 30-40 jobs, generate tax revenue, and improve the quality of the shopping center thus, enhancing the visibility and marketability of its current tenants. We need to encourage growth in commercial areas as recommended in the General Plan, especially at sites bordering other cities to prevent tax leakage to nearby cities. This project sits on a commercial space and will serve a commercial purpose to provide business to San José residents and nearby Cupertino and Saratoga residents.

We believe that the improvements proposed meet the intention of the council policy and that the City Council should approve the applicant's appeal with the mitigations.

## **CP11-026 Proposed Conditional Use Permit**

Community Meeting Notes

Thursday, March 28, 2013

6:30 p.m. – 8:00 p.m.

6148 Bollinger Road, San José

Chinese Performing Arts of America, Orchard Farm Shopping Center

### **Attendees:**

Approximately 170 attendees

#### **Council Staff Present:**

- Councilmember Pete Constant, District 1 Councilmember
- Rhovylynn Antonio, Chief of Staff
- Jerad Ferguson, Policy Advisor
- Chelsey Seagraves, Council Aide

#### **City Staff Present:**

- Kip Harkness, Facilitator, City Manager's Office
- Mike Enderby, Planning
- Megan Shurbsole, Planning

#### **Media Present:**

- Lisa Amin Gulezian, ABC 7 News

Facilitator opened the floor for all community members who wanted to speak and raised the following points regarding the project:

### **Traffic**

- Existing traffic and builds onto more future traffic
- Traffic on Miller, right hand turn to highway 280
- Traffic on narrow neighborhood streets
- Traffic concern for cyclists
- Congestion
- Right turn only causes circulation issues and will increase with a drive thru
- Miller and Bollinger are horrible for traffic and getting worse
- Don't trust San Jose to mitigate existing and future traffic
- Danger of "Lunch Dash"
- Traffic with schools – will get worse
- 7 schools in a 2-mile radius

### **Noise**

- Neighborhood noise
- Noise from drive-thru. Early morning and late in the evening with ambient noise is low

### **Pedestrian Safety**

- Fear of walking in the parking lot
- Hit and run cyclist accident on Hyde
- Not safe to walk
- Many school aged children
- Possible jay walking, children running across the street
- Less seasoned drivers

### **Parking**

- Parking behind is hidden
- Safeway takes up parking
- Drive thru would cause people waiting/driving through parking lot
- There is already an issue with parking and it will get worse
- Parking behind building is dark and does not feel safe
- Parking is already difficult

### **Property**

- Values for commercial up but residual value down
- Reside parking spaces to conform to parking standards
- Property values will be negatively affected
- Financial/tax money should stay in area to improve streets and community
- Concern with property values of houses across the street
- Investment in real estate – property value decline
- Decrease in residential will be equalized/ “a wash” with commercial values

### **Aesthetics/Neighborhood Character**

- Concern with neighborhood loss of commercial character
- Lot left empty
- Not a fast food chain restaurant- maybe a frozen yogurt
- Use not industrialized but community enhancing
- Use of architecture not consistent with neighborhood
- Village concept of walk ability not consistent with a drive-thru use
- McDonalds not in character with the area

### **Nutrition/Health**

- Lots of customers will be students
- Health issue
- Obesity in children
- Cooking burgers contributes to asthma, homes, health risk

### **Environment**

- Litter
- Toxic fume/emissions from cooking

- Emissions from cars at drive-thru
- Picking up the grease

### **Crime**

- Increased police activity in the area – could potentially trigger code blue at school
- Loitering around McDonalds
- Active drug culture in this development – drive thru will attract drug activity from elsewhere
- Safety for daycare and middle school children

### **Communication**

- Cities don't communicate with each other
- Cupertino residents should have a voice as well

### **Hope Services**

- Work of Hope Services important to the community
- Importance of onsite trailer on the property
- Increased donations, property value, and jobs onsite
- McDonalds would lead to greater public awareness of Hope Services
- Hope Services works with 3100 people with developmental disabilities
- Appreciation of Hope
- Great for recycling; concern it will be removed

### **City Trust**

- Concern with City Council having final approval even though plan has been altered/revised
- Mayor wants to concentrate on public safety but this is not in line with that

### **Other**

- Meeting conflict with religious holiday